78-633

IN THE

Supreme Court of the United States

October Term, 1978

LOCAL 102 INTERNATIONAL LADIES' GARMENT WORKERS' UNION,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Local 102 International Ladies' Garment Workers' Union,

Petitioner,

—against—

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Local 102 International Ladies' Garment Workers' Union, by its counsel, prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit entered in the above case on August 16, 1978, and from which rehearing was denied on August 29, 1978.

Opinions Below

The opinion of the United States District Court for the Eastern District of New York and the opinion of the United States Court of Appeals for the Second Circuit, affirming the decision of the District Court have not yet been reported, but are attached hereto as Appendices 1 and 2, respectively.

Jurisdiction

The Order of the United States Court of Appeals for the Second Circuit was entered on August 16, 1978. Petitioner timely filed a petition for rehearing and rehearing in banc. On August 29, 1978, the Second Circuit denied the petition for rehearing, and granted the Respondent's application for the immediate issuance of the mandate. The Second Circuit denied the Petitioner's petition for rehearing in banc on September 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Is *abuse* of the attorney-client privilege by the client, in communicating with its attorneys for the *purpose* of committing or furthering a crime, required to be shown, before an attorney will be compelled to testify concerning privileged confidential communications had with his client, or is it sufficient to destroy the privilege merely to show that third parties are engaging in ongoing criminal activity of which neither the attorney nor the client have knowledge or are participants?

Statement of Facts

Petitioner ("the client") is a labor union within the meaning of the National Labor Relations Act. The client had a yearly retainer agreement at all relevant times and for many years prior thereto with the law firm of Jaffe Cohen Crystal & Mintz, presently Marchi Jaffe Cohen Crystal & Mintz (hereinafter "the law firm"), and that firm represented the client in connection with a National Labor Relations Board ("NLRB") proceeding, where another union was seeking to be certified as collective bargaining representative for employees of an employer who was

already subject to a collective bargaining agreement with the client. The representation petition was scheduled for a hearing on the merits before the NLRB on May 2, 1978. On May 1, 1978 the client, by its manager, had two confidential conversations with an attorney in the law firm, and that attorney had one conversation with one of his partners concerning one of the conversations had with the client, all in connection with the matter scheduled for adversary hearing the following day. The respondent sought to compel the attorneys to disclose the substance of these privileged, confidential communications, claiming that the attorney-client privilege was inapplicable because the conversations allegedly related to on-going criminal activity of third parties. Both Courts below found, and the government concedes that neither of the attorneys had any knowledge nor any part of the alleged corrupt scheme, and, *a fortiori*, the communications must have been innocent on their face and could not have contained anything improper, or the attorneys would have been knowledgeable.

The sole basis upon which respondent sought to deprive the client of its attorney-client privilege was the fact that third parties (including the employer), with whom the client was required by law to deal, had sought to have the NLRB petition withdrawn by unlawful means, including bribery of officials of the petitioning union. However, the client, who was obligated to seek dismissal of the clearly invalid petition on behalf of its members, had not engaged in anything but lawful means in attempting to secure the dismissal of the petition. The Second Circuit in essence held that the client's attorney-client privilege would be forfeited, despite the fact that the client had not *abused* its attorney-client privilege by engaging in confidential communications with its attorneys for the purpose of committing or furthering a crime, and despite the fact that the client had no knowledge of and was not a participant in the alleged crime.

The Second Circuit set forth "so far as pertinent, the facts submitted by the government in support of its claim to examine . . .", and none of those facts are disputed. Thus, the only fact conceivably relating to the client which the Court deemed significant was that "It appears that the attorneys had been notified that the petition of Local 20408 was to be withdrawn, . . .".

However, it would have been totally expected and anticipated that the petition would be withdrawn once the true facts and circumstances were known to the union which had brought the invalid petition. It was shown in the Courts below, and was undisputed, that over 21% of all certification of representative petitions filed with the NLRB, according to the NLRB's own published statistics, are withdrawn prior to the termination of the hearings, many of them for precisely the same reason that this petition should have been withdrawn, to wit: The existence of a collective agreement with another union and the selection of an inappropriate unit. Moreover, it was further established in the Courts below and again undisputed, that it was the inherent duty of the client to seek dismissal or withdrawal of such invalid petition filed by another union seeking to represent workers employed by an employer in a bargaining unit already covered by collective agreements with the client. Thus, if "the attorneys had been notified that the petition of Local 20408 was to be withdrawn," that fact would be of no significance whatsoever and surely could not constitute *prima facie* evidence of illegality.

Despite the undisputed fact that the client had not *abused* its attorney-client privilege by engaging in confidential communications with its attorneys for the *purpose* of committing or furthering a crime, and despite the undisputed fact that the client had no knowledge of and was not a participant in the alleged crime, the District Court ordered that the attorneys testify as to the substance of the privileged communications, and on August 16, 1978, the Second Circuit affirmed. Petitioner timely moved for a rehearing, and on August 29, 1978 the Second Circuit denied Petitioner's petition for rehearing, ordered that the mandate of the Court issue forthwith, and denied Petitioner's motion for a further stay. On September 1, 1978, the Honorable Louis F. Powell, Jr. and the Honorable William J. Brennan, Jr. denied Petitioner's motion for a further stay pending application for a Writ of Certiorari. On September 21, 1978, the Second Circuit denied Petitioner's petition for rehearing in banc.

Reasons for Granting the Writ

This case raises fundamental issues of exceptional importance concerning the scope of the attorney-client privilege and the administration of justice, and if the decision of the United States Court of Appeals for the Second Circuit is permitted to stand, extremely adverse consequences could result which would radically alter the present relationship between clients and their attorneys. The decision below is in conflict with the decision of this Court in *Clark* v. *United States,* 289 U.S. 1 (1932), and is in conflict with the entire body of decisional law and treatises in this country, and constitutes a radical departure from all prior precedent.

As stated above, the respondent sought to compel the testimony of the attorneys as to privileged, confidential communications had with their client, on the ground that third parties (including the employer), with whom the client was required by law to deal, had sought to have the NLRB petition withdrawn by unlawful means, although the client had not sought to have the NLRB petition withdrawn by anything other than lawful means, and

although the client had no knowledge of and was not a participant in the alleged crime.

The holding of the Second Circuit is essentially as follows:

> (i) *Abuse* of the attorney-client privilege by the client, in seeking to communicate with its attorneys for the *purpose* of committing or furthering a crime, is not required to be shown before the attorney will be compelled to testify concerning privileged confidential communications had with the client; and
>
> (ii) The attorney-client privilege dissipates as to communications innocent on their face if third parties are engaging in ongoing criminal activity of which neither the attorney nor the client have been shown to have knowledge or be participants, but where the communications merely *relate* to the same general subject matter as the alleged crime.

In *Clark* v. *United States*, *supra*, at pp. 15-16, this Court held that before an attorney could be compelled to testify in derogation of the attorney-client privilege, the opponent of the privilege was required to establish a *prima facie* case that the client had *abused* the privilege by engaging in confidential communications with its attorneys *for the purposes of* committing or furthering a crime. Thus, the key element considered is whether the client has *abused* the attorney-client privilege by utilizing the attorney-client relationship for an *improper purpose*. This longstanding principle stems from the common law (See *O'Rourke* v. *Darbishire*, [1920] A.C. 581, cited with approval in *Clark*, *supra*), and has been given more recent approval in law treatises, such as *McCormick on Evidence*, 2d Ed. 1972.

> "Since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme . . . Accordingly, it is settled under modern authority that the privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a future intended crime or fraud." *McCormick on Evidence*, *supra*, at p. 199.

The Second Circuit, however, has failed to require *any* showing that the client *abused* the privilege or utilized the attorney-client relationship for an *improper purpose*. The Second Circuit appeared to hold simply that illegality on the part of third parties would be sufficient to destroy the privilege of a client who had no knowledge of, and was not a participant in, any criminal activity, but whose only "crime" was that his conversation with his attorneys generally encompassed a similar subject matter as the alleged crime. Never before has a court gone so far toward destroying the attorney-client privilege, and never before has it even been held that *abuse* of the privilege by the client or an *improper purpose* on the part of the client are not required to be shown. The significance of the decision is monumental in its impact upon the efficient administration of our adversary system of justice in that it may have a chilling effect upon the confidence and candor which clients will invest in their attorneys. The decision constitutes a radical departure from all prior precedent, including cases before this Court, and if it is permitted to stand, it will severely restrict the force and applicability of the attorney-client privilege in situations where neither the law nor the great historic purposes behind the privilege call for restriction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix 1

(Opinion of the United States District Court for the Eastern District of New York, Dated July 27, 1978, Bramwell, *J.*)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 78C1659

In the Matter of Local 102

I. L. G. W. U. etc.

United States Courthouse
Brooklyn, New York

July 27, 1978
11:30 o'clock A.M.

Before:

HONORABLE HENRY BRAMWELL,
U.S.D.J.

* * * * *

The Court: What I am going to do is I am going to make a statement from notes on the Court's decision. For the record, the background of the instant matter will be briefly discussed.

The Organized Crime Strike Force of the United States Attorney's Office for the Eastern District of New York moves this Court for an order compelling Allen Breslow and David Crystal, attorneys for the law firm representing Local #102 of the International Ladies Garment Workers

Appendix 1

Union in the matter before the Grand Jury, to render full disclosure of certain conversations which transpired on May 1, 1978.

Attorneys Breslow and Crystal, whose law firm has a yearly retainer agreement with Local 102 respectfully decline to testify concerning two telephone conversations between Attorney Crystal and Sidney Gerstein, manager of Local 102 [and a] "thirty second" discussion between the two attorneys, all of which took place on May 1, 1978. Their refusal is based on the ground that all three conversations are protected by the attorney-client privilege.

Furthermore, the attorneys assert the well settled principle which holds that where a labor organization is a client, the members of its control group such as Mr. Gerstein are protected by the attorney-client privilege.

I must, therefore, decide whether the privilege asserted by Attorneys Breslow and Crystal should be applied in this instance.

It has long been settled that confidential communications which take place between an attorney and his client are considered privileged and, therefore, not normally subject to disclosure unless the privilege is waived by the client. The policy underpinning this privilege, which finds its roots in 18th century England, is that promotion of honest and uninhibited dialogue between those seeking legal advice and those dispensing it.

However, despite its established nature, judicial decision-makers have not hesitated to deny its application where justice demands that full disclosure be made.

The Government beseeches this Court to make such a denial in this case by asserting that the Crystal-Gerstein telephone conversations were utilized by Gerstein to further an ongoing criminal conspiracy.

Appendix 1

In United States v. Bob, the Second Circuit addressed itself to such a claim. Quite pointedly, the court stated, and I quote:

"It has always been settled that communications from a client to an attorney about a crime or fraud to be committed are not privileged."

This doctrine, which is applicable to present, continuing illegality as well as intended crimes does not hinge upon the attorney's state of awareness.

In a recent decision, the Second Circuit articulated an explicit standard to be followed in a case such as this. In the Matter of Doe the court stated, and I quote:

"It is enough to defeat the claim of privilege that the contemplated crime would or might inure to the client's benefit and that he might be a participant."

This Court is in complete accord with the strict approach adopted by the Second Circuit for it would be nothing less than a perversion to present the cloak of privilege to one possibly engaged in plotting or pursuing illegal or fraudulent acts. Indeed, it is the vitality of the judicial system and not the sanctity of the privilege which must gain priority where the two are at loggerheads.

However, before this privilege can be denied and I again quote the Bob court:

"There must, of course, be first established a prima facie case; the mere assertion of an intended crime is not enough."

In the instant matter, the initial burden falls upon the attorneys seeking the application of the privilege. The Government urges this Court to find that the Crystal-Gerstein conversations did not involve the invocation or acquisition of legal advice or services and, as such, argues that its absence is fatal to the attorneys' claim of priv-

ilege. This Court, however, finds it unnecessary to conduct an exploration into the thorny edges of the Government's argument.

Rather, assuming arguendo that the attorneys at issue herein have met the criteria vital for them to overcome their initial hurdle, therefore shifting the burden to the Government to make a prima facie showing that there was a contemplated crime, that its successful completion had the potential of benefiting Gerstein and that Gerstein could have been a participant, I nonetheless, find that the disputed conversations must be disclosed.

Attorneys Breslow and Crystal assert in their memorandum of law that "substantiated allegations, by affidavit or otherwise" are required in order for the prima facie test to be made.

As support for their assertion, the landmark Supreme Court opinion in Clark v. United States is cited. However, I am of the opinion that a more accurate reading of Clark and its progeny is set forth by Professor McCormick in his treatise on evidence when he states that they require, and I quote:

"Only that the one who seeks to avoid the privilege bring forth evidence from which the existence of an unlawful purpose could reasonably be found."

It is, then, a reasonableness standard which is to be employed in determining whether the Government has met its burden.

The thrust of the Government's claim is that Sidney Gerstein, among others was involved in a criminal conspiracy to corruptly obstruct the proper administration of the National Labor Relations Board in violation of 18 U.S.C. 1505.

In particular the Government asserts that several persons linked or associated with Local 102, including Mr.

Gerstein, sought to secure the withdrawal of an organizing petition brought by Local 20408 of the United Warehouse, Industrial and Affiliate Trades Employees Union through bribery of cash payments and the admission of eleven men into the membership of Local 102. The affidavit of Mr. Harmon, Assistant Attorney-in-Charge of the Strike Force, establishes a sequence of events which a reasonable man would conclude supports the allegations of criminal activity which have been made. Without delving into each link in the chain, I find that the Government has reasonably demonstrated that the alleged criminal activity transpired.

Furthermore, the facts indicate that Mr. Gerstein was in the position of a man who could quite possibly have participated in the alleged conspiracy. It was Mr. Gerstein who performed the otherwise legal act of directing and supervising the admission of eleven men into Local 102, men whose admission is alleged to be in payment for the withdrawal of the organizing petition.

It was Mr. Gerstein who as manager and controlling officer of Local 102, stood in the passageway of any conspiratorial acts involving his union. Even the fact that it was Mr. Gerstein who made daily contact with Local 102's law firm, supports the Government's argument that he exercised a considerable degree of effective control over the union.

Therefore, I find it reasonable to conclude from the evidence presented to me that Mr. Gerstein might well have been a participant in the alleged conspiracy. Additionally, a close examination of such evidence reasonably indicates that Mr. Gerstein stood to possibly gain from the commission of the alleged crime since the withdrawal of Local 20408's organizing petition would have, in the least, stabilized Local 102's position, and, consequentially, enhance the posture of the man who exercised a considerable degree of effective control over 102.

With the foregoing in mind, I find that the Government has met its burden by establishing, prima facie, that the Crystal-Gerstein conversations may have been used by Gerstein as a means of furthering an ongoing conspiracy to violate federal law.

Therefore, this Court must deny to Attorney Crystal the protection of the attorney-client privilege in giving testimony to the Grand Jury, concerning these conversations.

Turning next to the Crystal-Breslow conversation, it is averred that the attorney work product rule acts as a barrier to the disclosure since said conversation was conducted, and I quote the attorneys' memorandum of law:

"In anticipation of or in connection with the pending civil proceeding before the NLRB."

This Court is slightly bemused by the invocation of the work-product rule given the direct relationship between the Gerstein conversations, and this one, a relationship which was acknowledged by Attorney Crystal in his testimony before the Grand Jury on June 12, 1978.

Furthermore, counsel has failed to cite a single authority which supports the application of the work-product rule in this context. While recognizing the tenor of counsel's argument, this Court is not prepared to shelter a discussion between lawyers which is admittedly interwined with the May 1, converations with Mr. Gerstein. Rather, this Court finds that the denial of privilege to the Crystal-Gerstein conversations is necessarily fatal to the claim of privilege concerning the Crystal-Breslow communication.

In making these findings I recognize the sensitivity which still surrounds the entire question of when the attorney-client privilege should be applied. I also take cognizance

of the resourceful arguments strongly asserted by counsel for Mr. Breslow and Mr. Crystal in seeking to protect the interests of their client.

In the final analysis, however, the force of the arguments in favor of the privilege's application are far outweighed by the demands of justice which demands its denial in this case.

Therefore, it is hereby ordered that Allen Breslow and David Crystal render full disclosure before the Grand Jury empaneled for the matter of Local 102 of the two telephone conversations of May 1, 1973 between Mr. Crystal and Sidney Gerstein and the conversation of May 1, 1978 between Mr. Crystal and Mr. Breslow.

The record of my opinion on this matter is to be sealed until further order of the Court. The parties are to settle an order on notice in conformity with the decision I have just rendered, and said order, upon signature of the Court, is also to be sealed. The parties herein are further ordered not to disclose the contents, substance or decision of the proceedings held today.

And I might say that I have read from notes due to the need for secrecy herein, and considering this no written opinion will follow.

Yes?

* * * * *

Mr. Jaffe: Your Honor, there are two things that I would request from your Honor. One is that in your opinion you put in a statement that Mr. Harmon acknowledged as late as yesterday that neither Mr. Crystal nor Mr. Breslow had any knowledge or any part of the corrupt scheme just in case their opinion ever gets published in a future date. This file will eventually be opened. My understand-

Appendix 1

ing, according to your order after the indictments come down.

The Court: If that is what he said I don't know what he is going to say—

Mr. Harmon: I still stand by the earlier statement as far as that is concerned. I have no objection to their being put.

The Court: To that extent the opinion is correct, and now so noted.

Mr. Jaffe: Thank you, your Honor.

* * * * *

Appendix 2

(Order of the United States Court of Appeals for the Second Circuit, Dated and Entered August 16, 1978)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 78-6125

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15 day of August, one thousand nine hundred and seventy-eight.

Present:

Hon. Ellsworth A. Van Graafeiland, Circuit Judge
Hon. Howard T. Markey, Chief Judge, U. S. Court of Customs and Patent Appeals
Hon. John F. Dooling, District Judge.

In the Matter of LOCAL 102, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, DAVID CRYSTAL, ALLEN BRESLOW,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ORDER

Local 102 and two of its attorneys have appealed from an order directing the attorneys to testify before a grand jury concerning conversations had with their client.

So far as pertinent, the facts submitted by the Government in support of its claim to examine are as follows.

Appendix 2

On April 5, 1978, Local 20408, United Warehouse Industrial and Affiliate Trades Employees Union filed a petition with the NLRB seeking recognition as the collective bargaining agent for certain employees of Interstate Dress Carriers, Inc. Interstate Dress Carriers was operating under a collective bargaining agreement with Local 102, Cloak and Dress Drivers and Helpers Union, International Ladies' Garment Workers' Union. The Government has secured evidence that an Interstate officer and several Teamsters Union officials participated in a bribe offer to the president of Local 20408 to induce him to withdraw his Union's petition for recognition. These officials have now been arrested and charged with violation of 18 U.S.C. § 1505.

On May 8, 1978, a special grand jury was impaneled to investigate this incident. The jury seeks, among other things, to determine whether officials of Local 102 were also involved. Towards this end, the grand jury seeks to examine two attorneys representing Local 102 concerning telephone conversations had with their client. It appears that the attorneys had been notified that the petition of Local 20408 was to be withdrawn, and this appears to be the subject matter of the conversation into which the grand jury wishes to inquire.

At the outset, we are met with the question of whether this is an appealable order. There is authority for the proposition that it is not. *See Duffy* v. *Dier,* 465 F.2d 416 (8th Cir. 1972); *In re Buckey,* 395 F.2d 385 (6th Cir. 1968); *American Express Warehousing, Ltd.* v. *Transamerica Insurance Co.,* 380 F.2d 277, 281 n. 9 (2d Cir. 1967). However, there is also authority to the effect that an intervenor may appeal where the testimony is that of a third party. *See In re Grand Jury Proceedings,* 563 F.2d 577 (3d Cir. 1977). We accept review of this case on behalf of Local 102 and dismiss as to the individual appellants.

Appendix 2

The attorney-client privilege does not extend to communications made in furtherance of ongoing criminal activity. As this Court stated in *In Re Doe,* 551 F.2d 899, 902 (2d Cir. 1977), "The attorney-client privilege has no relation to the disclosure of on-going criminal activity or information relating to it." The Government need not establish the requisites for disclosure beyond a reasonable doubt; it need only make a prima facie case. *See United States* v. *Bob,* 106 F.2d 37 (2d Cir.), *cert. denied,* 308 U.S. 589 (1939); *United States* v. *Hodge and Zweig,* 548 F.2d 1347 (9th Cir. 1977). Although the Government makes no contention of wrongdoing on the part of the attorneys, the information that it has presented is sufficient insofar as the client is concerned to require that testimony be given.

The order appealed from is affirmed.

HON. ELLSWORTH A. VAN GRAAFEILAND

HON. HOWARD T. MARKEY

HON. JOHN F. DOOLING

August 16, 1978.

No. 78-633

In the Supreme Court of the United States

OCTOBER TERM, 1978

LOCAL 102, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-633

LOCAL 102, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a labor union local, contends that a district court order directing its attorneys to testify before a grand jury about conversations one of them had with petitioner's controlling officer violated the attorney-client privilege.

1. On May 8, 1978, a special grand jury was impaneled in the United States District Court for the Eastern District of New York to investigate a bribe offer made to the president of Local 20408 of the United Warehouse, Industrial and Affiliate Trades Employees Union. The purpose of the offer was to induce him to withdraw his union's petition seeking recognition from the NLRB as the collective bargaining agent for certain employees of Interstate Dress Carriers, Inc., and for production and maintenance employees employed at the Jersey City location of G&S Temporary Service, Inc. and G.S.

Supply Associates, Inc. The grand jury sought, among other things, to determine if officials of petitioner Local 102, which was operating under a collective bargaining agreement with Interstate, were involved in the bribe offer. Among those called to testify were David Crystal and Allen Breslow, attorneys for Local 102. Invoking the attorney-client privilege on behalf of his client, Crystal refused to disclose the details of two telephone conversations he had with Sidney Gerstein, manager and controlling officer of Local 102. Additionally, both Crystal and Breslow declined to divulge the substance of a brief conversation with each other. On July 14, 1978, the government moved to compel Crystal and Breslow to disclose the conversations. The district court granted the motion in an oral opinion (Pet. App. 1a-8a), and the court of appeals affirmed (Pet. App. 9a-11a).[1] On September 5, 1978, after Justices Powell and Brennan denied Local 102's motion for a stay pending application for a writ of certiorari, both attorneys testified before the grand jury as to the substance of the conversations. Local 102 and Gerstein, among others, were subsequently indicted for obstructing proceedings before the NLRB and conspiring to commit that offense, in violation of 18 U.S.C. 1505 and 371.

In support of its motion to compel the testimony, the government offered uncontradicted evidence that on April 12, 1978, Anthony DiLapi, an organizer for Teamster's Local 522, told Mathew Eason, president of Local 20408, that if the NLRB petition were withdrawn, Eason would be paid a sum of money and permitted to name certain

[1]Breslow and Crystal also appealed from the order, but their appeals were dismissed for lack of jurisdiction. *United States* v. *Ryan*, 402 U.S. 530 (1971). The court of appeals found that it had jurisdiction over Local 102's appeal because Local 102 was an intervenor claiming a privilege as to the testimony of a third party. See *Perlman* v. *United States*, 247 U.S. 7 (1918); *In re Grand Jury Proceedings*, 563 F. 2d 577, 580 (3d Cir. 1977) (Pet. App. 10a).

men whom DiLapi would arrange to have admitted into Local 102 (J.A. 8).[2] DiLapi and Benjamin Ladmer, an officer of Local 300 of the International Production Service and Sales Employees Union, subsequently offered Eason $3,500 to withdraw the petition (J.A. 14). They also warned that if he refused to cooperate, G&S Temporary Service, Inc., whose Jersey City maintenance employees Local 20408 was also seeking to represent, would go out of business, reopen under another name, and refuse to rehire the former employees (J.A. 14, 112-113).[3] On April 27, 1978, Sidney Lieberman, vice president of Interstate, increased the bribe offer to $5,000 and actually paid Eason $2,000. He also agreed to arrange with Gerstein to have Fred Lawson and ten other men of Eason's choice admitted into Local 102 in consideration for withdrawal of the petition (J.A. 8, 14). The next day Gerstein directed Lawson's admission into the union (J.A. 8). Eason thereafter furnished ten additional names to Lieberman's secretary, and Gerstein immediately dictated a memorandum directing their admission into the union (J.A. 9, 16).

The day before the NLRB hearing, Gerstein had a telephone conversation with Crystal that included discussion of the withdrawal of the petition. After Crystal spoke briefly with Breslow about the anticipated withdrawal of the petition, he again conferred with Gerstein on the subject (J.A. 10, 62, 120-121). At the NLRB hearing, Breslow told the hearing examiner that the petition might be withdrawn (J.A. 11).

[2]"J.A." refers to the Joint Appendix filed in the court of appeals.

[3]The government advised the district court that its investigations showed that G&S Temporary Service, Inc., one of the three employers named in the representation petition filed with the NLRB by Local 20848 (J.A. 54), furnished non-union employees to Interstate, which employed them as "temporary" workers at less than union scale (J.A. 112).

2. The order that Local 102 attacks in this case is the district court's order directing attorneys Breslow and Crystal to testify before the grand jury concerning the conversations at issue. Because, as noted above (page 2), the attorneys have now testified before the grand jury as to those conversations, the case is moot and certiorari should therefore be denied for lack of jurisdiction. See *Barney* v. *United States*, 568 F. 2d 116, 117 (8th Cir. 1978); *Kurshan* v. *Riley*, 484 F. 2d 952 (4th Cir. 1973); *Vesco* v. *SEC*, 462 F. 2d 1350, 1351-1352 (3d Cir. 1972).[4]

3. In any event, there is no merit to Local 102's claim. The challenged conversations were not protected by the attorney-client privilege. As the courts below recognized, the privilege does not extend to conversations relating to ongoing criminal activity. *Clark* v. *United States*, 289 U.S. 1, 15 (1933); *In re Doe*, 551 F. 2d 899, 901 (2d Cir. 1977); *United States* v. *Friedman*, 445 F. 2d 1076, 1086 (9th Cir.), cert. denied, 404 U.S. 958 (1971). To defeat the privilege the government need not establish the existence

[4]There is, however, no reason for this Court to vacate the judgment of the court of appeals. As we show below, Local 102's claim would not merit review even in the absence of a suggestion of mootness. This case is thus unlike those that become moot after a grant of certiorari, thereby depriving this Court of jurisdiction to decide a legal issue thought worthy of review. See, *e.g.*, *Weinstein* v. *Bradford*, 423 U.S. 147 (1975). Similarly the rule applicable to cases that become moot while on appeal is inapposite here, since in such instances the appellant has been deprived of his statutory right to an appellate resolution of the controversy. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). By contrast, "[a] review on writ of certiorari is not a matter of right * * *." Sup. Ct. R. 19(1). (These points are explored at greater length in our opposition to the petition in *Velsicol Chemical Corp.* v. *United States*, No. 77-900, cert. denied, 435 U.S. 942 (1978), a copy of which we are sending to Local 102.) In any event, if Breslow, Crystal, or both of them testify at the trial of the charges stated in the indictment filed against Local 102 and others (page 2, *supra*), Local 102 can reassert its claim of privilege and present that claim anew to this Court if it is convicted and the conviction affirmed.

of ongoing criminal activity beyond a reasonable doubt; there need only be " 'something to give colour to the charge [of illegality],' " that is, " '*prima facie* evidence that it has some foundation in fact.' " *Clark* v. *United States*, *supra*, 289 U.S. at 15, quoting from *O'Rourke* v. *Darbishire*, [1920] A.C. 581, 604. See also *United States* v. *Friedman*, *supra*, 445 F. 2d at 1086; *United States* v. *Bob*, 106 F. 2d 37, 40 (2d Cir.), cert. denied, 308 U.S. 589 (1939).

The government's uncontradicted evidence in this case showed that the conspiracy to secure withdrawal of the NLRB petition included an agreement to admit Fred Lawson and ten other men into Local 102. After Eason gave Lawson's name to Lieberman, Gerstein directed Lawson's admission. Immediately after Eason furnished Lieberman's secretary with ten additional names, Gerstein personally dictated a memorandum directing their admission. The government also showed that the conversation between Gerstein and Crystal the day before the NLRB hearing related to the withdrawal of the petition and that Breslow indicated to the hearing examiner the following day that he understood the petition would be withdrawn. It is reasonable to conclude that Gerstein learned of the withdrawal from one of the other conspirators and that such non-public information would not have been conveyed to him unless he were a party to the conspiracy. Moreover, Gerstein clearly stood to gain from the conspiracy, since, as the district court noted (Pet. App. 5a), "the withdrawal of Local 20408's organizing petition would have, in the least, stabilized Local 102's position, and, consequentially, enhance the posture of the man who exercised a considerable degree of effective control over 102."[5] These facts, as the courts

[5]The attorney need not himself be aware of the illegality to defeat the attorney-client privilege. *Clark* v. *United States*, *supra*, 289 U.S. at 15; *United States* v. *Friedman*, *supra*, 445 F. 2d at 1086.

below found, clearly permit the inference that the challenged communications related to an ongoing conspiracy.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

DOJ-1978-12

78-633

IN THE

Supreme Court of the United States

October Term, 1978

LOCAL 102 INTERNATIONAL LADIES' GARMENT WORKERS' UNION,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF CERTIORARI

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IN THE

Supreme Court of the United States

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LOCAL 102 INTERNATIONAL LADIES' GARMENT WORKERS' UNION,

Petitioner,

—against—

UNITED STATES OF AMERICA,

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REPLY BRIEF IN SUPPORT OF CERTIORARI

Preliminary Statement

The Government in effect has taken the position that confidential communications between clients and attorneys, although innocent on their face,* are not protected by the attorney-client privilege, regardless of the fact that neither the attorney nor the client had knowledge of or participated in a crime, and regardless of the fact that the client's purpose in obtaining legal advice was innocent, as long as the challenged communications, in the light of facts unknown to the client or the attorney, which unknown facts can be deemed relevant to ongoing criminal activity.

* Contrast *In re Doe*, 551 F.2d 899 (2d Cir. 1977), where the communication between attorney and client, unlike the communication in the instant case, on its face revealed the existence of an ongoing crime—the possible bribing of a juror. In the instant case, the communication on its face revealed no more than the possibility of withdrawal of a petition pending before the National Labor Relations Board—a common and lawful event in the absence of corrupt actions.

This position is completely contrary to the principles set forth by this Court in *Clark* v. *United States,* 289 U.S. 1 (1932), the Federal Rules of Evidence,* Treatises,** and the historic purposes behind the attorney-client privilege.

In an apparent attempt to disguise the obvious pitfalls in its legal position, the Government is in the anomalous position of actually impeaching the decision of the Second Circuit, which decision the Government seeks to have this Court affirm. Thus, the Government argues that this Court should rely upon certain allegations which were not found either to be true or to be relevant by the Second Circuit.*** The missing element in the Government's case is a showing of knowledge on the part of Local 102 (hereinafter "the client") of the existence of any ongoing criminal activity. In fact, all that the Government even claims about the client is that it admitted into membership 11 persons who were presented to the client as eligible covered workers. However, this merely evidences the client's performance of a perfectly lawful, required and mandatory

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* See Rule 503(d)(1), which requires a showing of *both knowledge and intent by the client* in order to apply the exception to the attorney-client privilege with respect to communications relevant to ongoing criminal activity.

** See McCormick on Evidence, 2nd ed. 1972, which is discussed in the petition for a Writ of Certiorari, at pages 6-7.

*** Thus, the Government claims that there is "uncontradicted evidence" that the alleged conspiracy included an agreement to admit Fred Lawson and 10 other men to membership in the client. The Second Circuit did not find this to be a relevant fact, or for that matter, a fact at all. The client clearly and explicitly stated that it admitted Lawson and the 10 men, not as a part of any conspiracy whatsoever, but in conformance with its mandatory duty to accept eligible covered workers into membership. The client specifically denied that it had any knowledge whatsoever of any conspiracy, and the Government presented no proof of any such knowledge.

act, the nonperformance of which might be unlawful or might constitute a violation of the collective bargaining agreement.

The Government further argues to this Court that the case is moot, despite the fact that it cites no authority of this Court in support of its position and in fact ignores established precedent of this Court which indicates the contrary, despite the fact that the Government is involved in a criminal trial with the client in the Eastern District of New York, where the illegal disclosure of privileged confidential communications made to the grand jury is intended to be revealed, and despite the fact that this Court has the power to fashion a remedy to protect the client against the unlawful use made before the grand jury by the Government of the privileged confidential communications.

It is respectfully submitted that the Government's suggestion of mootness and the Government's interpretation of the attorney-client privilege are totally without merit. The Government does not dispute the fact that the issues raised herein are of transcendent importance and significance to the legal profession, and to all persons dealing or contemplating dealing with lawyers. Thus, this Court should grant the client's Petition for a Writ of Certiorari, and decide this case on the merits.

The Government's Suggestion of Mootness Ignores Established Precedent of This Court and Is Totally Without Merit.

The constitutional prohibition against deciding questions where no case or controversy exists does not prevent this Court from granting the client's Petition for a Writ of Certiorari, and deciding this case on the merits. This Court has held that where a Governmental action has ad-

versely affected and continues to adversely affect a present interest of private parties, a case or controversy exists and an appeal will not be dismissed as moot. *Super Tire Engineering Company* v. *McCorkle,* 416 U.S. 115 (1974). Additionally, it is established that obedience to the mandate of the Court of Appeals and the judgment of the District Court will not moot a case and cause a party to lose his right to seek a reversal of the ruling. *Mancusi* v. *Stubbs,* 408 U.S. 204 (1972). An analysis of the facts of the case at bar demonstrates that the facts fall squarely within the foregoing clear and established principles, and that therefore the case is not moot.

The pertinent facts of this matter are as follows:

On July 14, 1978, the Government moved to compel David Crystal II, a member of the firm of Marchi Jaffe Cohen Crystal & Mintz, the longstanding general counsel for the client, to testify before a grand jury as to the substance of two confidential conversations had between Sidney Gerstein, Manager of the client, and David Crystal, with reference to a matter scheduled for adversary hearing before the National Labor Relations Board on the following day, which conversations were fully protected from disclosure and use by the attorney-client privilege. The District Court granted the Government's motion, the Second Circuit affirmed, and on September 1, 1978, Justices Powell and Brennan of this Court denied the client (which had intervened to protect its rights), a stay of the order compelling the testimony of David Crystal pending the filing and determination of the client's Petition for a Writ of Certiorari. On September 5, 1978, pursuant to Court order, David Crystal testified before the grand jury as to the two privileged confidential conversations. On September 6, 1978, the client was indicted for conspiring to obstruct,

and obstructing proceedings before the National Labor Relations Board.

The attorney-client privilege protects against both the *disclosure* and *use* of privileged confidential communications. This case has not been rendered moot with respect to either of these protections.

The privileged testimony has thus far only been *disclosed* to the grand jury, whose deliberations are secret. However, further disclosure of the grand jury testimony is likely to occur during the course of the pending criminal trial and, in fact, the Government has announced its intentions to call Mr. Crystal as a witness at the trial, which of course is the predicate for the further disclosure of his grand jury testimony, including the confidential communications. See *Jencks* v. *United States,* 353 U.S. 657 (1957). Thus, although the matter of disclosure of the testimony to the grand jury may be moot, the matter of disclosure of that testimony beyond the grand jury is a continuing controversy between the parties.

Protection against the *use* of the privileged testimony similarly is not moot. The grand jury voted an indictment the day after the privileged testimony was elicited. It would appear that in voting the indictment, the grand jury may have *used* the privileged testimony. If this is the case, the indictment is thereby tainted and must be dismissed as being "the fruit of the poisonous tree". See, e.g., *Wong Sun* v. *United States,* 371 U.S. 471 (1963); *United States* v. *Jones,* 542 F.2d 186 (4th Cir.), *cert. denied,* 426 U.S. 922 (1976) (use of testimony). Thus, should this Court hold that the compelled testimony is protected by the attorney-client privilege, this Court should remand the case to the District Court for a determination of whether or not the grand jury used the illegal evidence in

returning the indictment against the client. Clearly, this Court has the power to fashion such an appropriate remedy to prevent the use of illegal evidence. This Court developed the exclusionary rule to remedy the problem of illegal confessions and illegal searches and seizures by the Government. Illegal evidence is illegal evidence whether obtained by the Government through illegal confessions or illegal searches and seizures or whether obtained by the Government through illegal forced disclosure of confidential communications.

Thus, a continuing controversy exists as to both the *disclosure* of the privileged testimony beyond the grand jury and as to the *use* of the illegal testimony in obtaining a tainted indictment. The parties before this Court are the same parties before the Eastern District of New York, and the issue being litigated in this Court is of critical importance to the question of the validity of the indictment and to the pending criminal trial in the District Court. Thus, there is nothing "abstract, feigned or hypothetical" about the issues in this case. See *Sibron* v. *New York*, 392 U.S. 40, 57 (1968). The Government's action in compelling the disclosure of testimony protected from disclosure and use by the attorney-client privilege and the apparent reliance upon that testimony by the grand jury in voting an indictment, have adversely affected and clearly continue to adversely affect the rights of the client in the criminal proceeding. This Court is not without the ability to prevent further disclosure and to fashion a remedy for the apparent illegal use of such privileged and confidential communications.

In *Super Tire Engineering Company* v. *McCorkle*, *supra*, this Court established the following principles in determining whether or not a case or controversy exists:

> "the challenged governmental activity in the present case is not contingent, has not evaporated, or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties. . . ." 416 U.S. 115, at p. 122.
>
> "where such State action [immediate and direct] or its imminence adversely affects the status of private parties, *the courts should be available to render appropriate relief* and judgments affecting the parties' rights and interests, . . ." 416 U.S. 115, at p. 125. (Emphasis added).

It cannot be disputed that "the challenged governmental activity" is not contingent, but in fact continuing, and that it immediately and directly adversely affects the right of the client herein. Moreover, it is submitted that the adverse effect of the Government's action on the client is even more it immediately and directly adversely affects the rights of the Government's action on the employer in *Super Tire*, where the claim was that eligibility of striking workers for welfare benefits affected the "ongoing collective relationship" between employers and unions, and where this Court refused to moot the appeal despite the fact that the strike in question had terminated prior to appellate review. Thus, under the principles established by this Court in *Super Tire*, this case is not moot, and the Government's suggestion to the contrary, when coupled with the Government's apparent acceptance of the fundamental significance of the issues raised in this case, and the Government's attempt to impeach the findings of the Second Circuit as to the relevant facts, reveals the untenable position in which the Government finds itself in opposing the Petition for a Writ of Certiorari.

In *Mancusi* v. *Stubbs*, *supra*, this Court held that "obedience to the mandate of the Court of Appeals and the judgment of the District Court does not moot this case," at p. 206. This Court relied upon *Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U.S. 437 (1948) and *Dakota County* v. *Glidden*, 113 U.S. 222 (1885) for the proposition that where a defendant merely submits to perform the judgment of the court, he will not lose his right to seek a reversal of that judgment by writ of error or appeal. In the case at bar, David Crystal merely obeyed the mandate of the Court of Appeals and the judgment of the District Court in testifying as to the privileged conversations before the grand jury. The Government suggests that the client's case is moot because a third party witness, David Crystal, testified in compliance with Court order. The rationale of *Mancusi* v. *Stubbs*, *supra*, is even more compelling under these circumstances—the client should not lose its right to seek a reversal of the ruling which seriously affects its rights, because of the forced disclosure of privileged confidential communications by a third party.

In support of its position that this case is moot, the Government ignored established precedent of this Court, and instead cited three totally inapposite circuit court tax cases. (See Memorandum in Opposition, at p. 4.) In each of the cases cited by the Government, documents were subpoenaed by the Internal Revenue Service pursuant to an investigation, and after non-compliance, the Government moved to compel enforcement of the subpoenas. The District Court granted the motions, and the documents were produced pending appellate review of the matters. In each of the cited cases, the further *disclosure* and future *use* of these documents was speculative only, and no criminal proceedings were then involved. However, in the case at bar, the compelled testimony has apparently already been used to obtain an indictment, which is thereby tainted and

must be dismissed, and the Government has announced that it will attempt to adduce evidence of the privileged confidential conversations at the pending trial, which will require further disclosure of the grand jury testimony. See *Jencks*, *supra*. In fact, the case at bar is most similar to a tax case not cited by the Government—*United States* v. *Friedman, et al.*, 532 F.2d 928 (3rd Cir. 1976). In *Friedman*, the taxpayers intervened in the proceeding to prevent their accountant from supplying the Internal Revenue Service with books, records and documents subpoenaed, on the grounds that the IRS summonses were illegal because they were issued solely to gather evidence for use in a criminal prosecution. (Here, the client seeks to prevent the further disclosure and to obtain a remedy for the illegal use of confidential communications protected by the attorney-client privilege. The testimony was compelled for the same purpose as in *Friedman*—to gather evidence for use in a criminal prosecution.) The District Court ordered the accountant to produce the materials subpoenaed, and the accountant complied with the Order while the case was on appeal to the Third Circuit. The Government's contention that the case was moot was denied by the Third Circuit:

> "If the taxpayers were to prevail in their contention that all summonses were illegal because they were issued solely to gather evidence for use in a criminal prosecution, then the records acquired from Friedman *would* have been obtained unlawfully. Such a ruling *could* affect the *possible* use of these records in any *subsequent* criminal or civil proceeding brought against the taxpayers. . . . The controversy between the IRS and the taxpayers over these records is still very much alive", at p. 931. (Emphasis added.)

In *Friedman*, the Third Circuit alluded to the *possible* use of tainted evidence in subsequent criminal (or civil) pro-

ceedings. However, the facts in the case at bar militate against a finding of mootness even more than in *Friedman*, because here, the illegal evidence has apparently already been used to obtain an indictment, which is thereby tainted and must be dismissed, and the Government has announced its intentions to call Mr. Crystal as a witness at the trial, which is the predicate for the further disclosure of his grand jury testimony, including the confidential communications. See *Jencks, supra.*

The Government's Claim That the Challenged Communications Are Not Protected by the Attorney-Client Privilege Is Based Upon Allegations Which the Second Circuit Did Not Find to Be Facts Nor to Be Relevant, and Upon a Misreading of Established Precedent of This Court, and if the Government's Position Is Accepted, It Would Radically Diminish the Protection of the Attorney-Client Privilege.

The Government does not deny the significance of the issues raised by the client, or the importance of the attorney-client privilege, yet the position which it espouses would severely emasculate the vitality of that privilege and the confidence which clients would feel free to invest in their attorneys. In addition, it is revealing of the weakness of the Government's position that it relies upon allegations in support of its conclusion, which allegations the Second Circuit did not find to be facts nor to be relevant.

As set forth in the client's Petition for a Writ of Certiorari, at page 4, there was no basis to conclude that the client knew of the alleged crime, was a participant in the alleged crime, or communicated with its attorneys in order to commit or further the alleged crime. The only fact applicable to the client which the Second Circuit deemed pertinent was that "it appears that the attorneys had

been notified that the petition of Local 20408 was to be withdrawn . . .". However, in its Memorandum in Opposition, the Government relied upon one additional allegation which related to the client—the admission of Fred Lawson and 10 other men into membership in the client. Although it is respectfully submitted that this Court need not accord any weight to the additional allegation raised by the Government, nevertheless counsel is impelled to comment upon the allegation because it does not, in any way, warrant abrogation of the attorney-client privilege.

The undisputed evidence in this case clearly revealed that the client and Sidney Gerstein, Manager of the client, had no contact whatsoever with Matthew Eason, or with any of the alleged co-conspirators in the case, with the exception of Sidney Lieberman (and his company Interstate Dress Carriers, Inc.). Lieberman was the manager of an association of employers in collective relations with the client and, in fact, was a signatory of the collective bargaining agreement. He was also the Vice President of an employer, which was a member of that multi-employer bargaining representative. The client was required to deal with Mr. Lieberman in each of his said capacities, pursuant to the collective bargaining agreement. As was usual, the employer advised the client that certain employees were "eligible covered workers" for the purpose of admission into membership in the client pursuant to the collective bargaining agreement. The agreement required union membership after 30 days of covered employment by an employer who was a member of the applicable association of employers. It was admitted by the Government that the client's acceptance into membership of these eligible covered workers was a perfectly lawful act. Indeed, it was undisputed below that it was the client's mandatory duty to accept into membership these eligible covered workers, and, in fact, a failure to do so

by the client could constitute a direct violation of federal labor laws and would be a breach of the collective bargaining agreement. Thus, the Government, unlike the Second Circuit, has inferred criminal conduct by the client from the performance of a perfectly lawful act which was, in fact, required of the client. Surely, the admission of these eligible covered workers adds nothing to the Government's *prima facie* showing of illegality on the part of the client; in fact, had the client failed or refused to admit these eligible covered workers into membership in the client, that action could have constituted a *prima facie* showing of illegality on the part of the client.

The Government critically misread the clear and unambiguous teaching of this Court in *Clark* v. *United States, supra*. The Government claims that *Clark* stands for the proposition that "the privilege does not extend to conversations *relating* to ongoing criminal activity." (Memorandum in Opposition, at p. 4.) (Emphasis added.) Nothing could be further from the truth. In *Clark*, this Court stated that the opponent of the attorney-client privilege would be required to establish a *prima facie* case that the client *abused* the privilege and that the client sought his attorney's advice for the *purpose* of committing or furthering a crime.

> "The privilege takes flight if the relation is *abused*. A client who consults an attorney for advice that will serve him in the commission of a [crime] will have no help from the law." *Clark* v. *United States*, 289 U.S. 1, at p. 15. (Emphasis added)

Otherwise, a client totally innocent of any wrongdoing would have no protection of his innocent privileged, communications with his attorneys, if such communications innocently related to a similar subject matter as an unknown

alleged ongoing crime by others. Thus, it is the client's *knowledge* and *intentions* in consulting his attorney which determine whether the privilege should be abrogated. Indeed, Rule 503(d) (1), Federal Rules of Evidence clearly supports this Court's teaching in *Clark* that it is the client's *knowledge* and *intentions* which are controlling. The great policies behind the attorney-client privilege—encouraging candor and full disclosure by the client to his attorney—would be crippled by a contrary view.

In summary, in order to abrogate the attorney-client privilege as to confidential communications, prior to the admission of privileged testimony, it was incumbent upon the Government to establish a *prima facie* case that the client *abused* the attorney-client privilege by consulting its attorney for the purpose of aiding the client in the commission or furtherance of a crime, or with the client's knowledge that the client's communication related to an ongoing crime. The failure to require a showing of *abuse* of the privilege by the client would radically diminish the protection of the attorney-client privilege where the client innocently discusses a matter with his attorney, which matter, unbeknownst to the client, is related by subject matter to the substance of an unknown alleged ongoing crime allegedly being committed by someone else. This is precisely what the Government has done—it has made no showing that the client *abused* the privilege; instead, it has simply shown that one day prior to an adversary hearing on a representation petition, the client consulted its general counsel with reference to the matter, which matter (or the disposition of which matter) turned out to be related to an unknown alleged ongoing crime being committed by someone else.

The attorney-client privilege is a keystone of confidence invested in attorneys by clients. Such confidence is basic

to our adversary system of justice. The Government must not be permitted to substantially erode such confidence for to do so is to distort and weaken the structure of our adversary system.

CONCLUSION

For the reasons set forth above and in the petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted, and that this Court should decide this case on the merits.

Respectfully submitted,

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